

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DONNA GENSCHORCK,

Plaintiff,

v.

SUTTEL & HAMMER, P.S.,
NICHOLAS FILER and JANE DOE
FILER, husband and wife; and
AMERICAN EXPRESS CENTURION
BANK,

Defendants.

NO: 12-CV-0615-TOR

ORDER DENYING PLAINTIFF'S
MOTION OF RECONSIDERATION

BEFORE THE COURT is Plaintiff's Motion for Reconsideration (ECF No. 66). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing and the record and files herein, and is fully informed.

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1 BACKGROUND

2 Plaintiff seeks reconsideration of the Court's November 21, 2013, Order
3 Granting Defendants' Motions for Summary Judgment and Granting Plaintiff's
4 Motion for Judgment on the Pleadings (ECF No. 59). For the reasons discussed
5 below, the motion will be denied.

6 DISCUSSION

7 A motion for reconsideration may be reviewed under either Federal Rule of
8 Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief
9 from judgment). *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir.
10 1993). Under Rule 59(e), "[r]econsideration is appropriate if the district court (1)
11 is presented with newly discovered evidence, (2) committed clear error or the
12 initial decision was manifestly unjust, or (3) if there is an intervening change in
13 controlling law." *Id.* at 1263; *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*,
14 555 F.3d 772, 780 (9th Cir. 2009). Rule 60(b) allows a district judge to provide
15 relief from a final judgment if the moving party can show

16 (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly
17 discovered evidence that, with reasonable diligence, could not have been
18 discovered in time to move for a new trial under Rule 59(b); (3) fraud ...,
19 misrepresentation, or misconduct by an opposing party; (4) the judgment is
20 void; (5) the judgment has been satisfied, released, or discharged; it is based
on an earlier judgment that has been reversed or vacated; or applying it
prospectively is no longer equitable; or (6) any other reason that justifies
relief.

1 Fed. R. Civ. Pro. 60(b). Whether to grant a motion for reconsideration is within
2 the sound discretion of the court. *Navajo Nation v. Confederated Tribes and*
3 *Bands of the Yakama Indian Nation*, 331 F.3d 1041, 1046 (9th Cir. 2003). The
4 Ninth Circuit has held that

5 A district court does not abuse its discretion when it disregards legal
6 arguments made for the first time on a motion to amend, and a party that
7 fails to introduce facts in a motion or opposition cannot introduce them later
in a motion to amend by claiming that they constitute “newly discovered
evidence” unless they were previously unavailable.

8 *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001) (internal
9 citations omitted). Reconsideration is also properly denied when a litigant
10 “present[s] no arguments in his motion for [reconsideration] that had not already
11 been raised in opposition to summary judgment.” *Taylor v. Knapp*, 871 F.2d 803,
12 805 (9th Cir.1989).

13 Here, Plaintiff’s arguments for reconsideration consist of a rehashing of their
14 evidence and arguments in opposition to summary judgment, evidence in existence
15 at the time Defendants’ motion for summary judgment was filed, and arguments
16 not raised in their response to the motion for summary judgment. Plaintiff makes
17 no showing that the Court committed clear error or that its decision was manifestly
18 unjust. Nor does Plaintiff establish that there has been a change in the law entitling
19 her to relief. The Court addresses each of Plaintiff’s arguments in turn.

1 Plaintiff first argues that a plaintiff's testimony alone is sufficient to create a
2 triable issue of fact as to emotional distress under the FDCPA, citing *Pacific*
3 *Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013),
4 and apparently implying that the Court was in clear error in its finding that
5 Gencshorck had not demonstrated sufficient evidence of emotional distress under
6 the FDCPA. But *Pacific Shores* states that "[d]amages are available under the *FHA*
7 for any *unusual level* of anxiety, embarrassment, or humiliation suffered by
8 plaintiffs as a result of a defendant's discriminatory actions, and a plaintiff's
9 testimony is sufficient to create a triable issue of fact as to such emotional
10 distress." 730 F.3d at 1172 (emphasis added). Thus, though Plaintiff is correct in
11 stating that, in this case, a plaintiff's testimony was sufficient to create triable
12 issues of fact as to emotional distress, the case cited pertains to a different statute
13 (the Fair Housing Act) and the level of "anxiety, embarrassment, or humiliation
14 suffered" must still be "unusual."

15 The Court rather restates that it relied on a lack of sufficient proof, rather
16 than type of proof, having extensively reviewed Plaintiff's deposition testimony
17 filed with the motion for summary judgment, and reaffirms its reliance on
18 persuasive case law indicating that plaintiffs must demonstrate more than
19 "transitory symptoms of emotional distress and unsupported self-serving
20 testimony." See *Costa v. Nat'l Action Fin. Serv.*, 634 F.Supp.2d 1069, 1078 (E.D.

1 Cal. 2007). The Court likewise reaffirms its finding that Plaintiff's testimony
2 simply did not indicate anything more than "transitory symptoms of emotional
3 distress"—nothing even to rise to the level of "unusual" anxiety, embarrassment,
4 or humiliation required in the case Plaintiff cites. The Court further notes that it
5 held that, due to Plaintiff's and Plaintiff's counsel's decision to wait fourteen days
6 to call Suttell & Hammer after learning of the intended wrongful garnishment,
7 Plaintiff's damages were limited to those incurred before she or her attorney could
8 have reasonably called Suttell on April 3. Thus, Plaintiff's damages for emotional
9 distress are limited to those incurred before any money was garnished. The
10 humiliation to which Plaintiff attests arises from her co-workers' knowledge of her
11 garnishment, from having to borrow money from her relatives, and from not being
12 able to buy necessities—embarrassments that could likely have been avoided or
13 diminished had Plaintiff or her counsel contacted Suttell & Hammer immediately
14 upon learning of the threatened garnishment.

15 In a related argument, Plaintiff next contends that this Court is
16 precluded from finding that simply calling Suttell and Hammer P.S. and
17 allowing them to attempt to avoid responsibility by following a procedure
18 Suttell and Hammer P.S. has created to apply when they get caught [in]
19 wrongful garnishments is superior to following the statutory procedure
developed by the Washington legislature and approved by Judge Eitzen of
the Spokane County Superior Court.

20 ECF No. 66 at 9. Plaintiff inaccurately summarizes the Court's finding; rather, the

1 Court found that Plaintiff failed to mitigate her damages when Plaintiff and her
2 attorney failed to contact Suttell & Hammer until four days after the garnishment,
3 though they had met to discuss it ten days before the garnishment. *See* ECF No. 59
4 at 10 (Order Granting Defendant’s Motions for Summary Judgment). Accordingly,
5 in light of the avoidable consequences doctrine applied to federal statutory
6 violations, Plaintiff’s damages were limited to those incurred before she or her
7 attorney could have reasonably called Suttell. *Id.* The Court did not find that such
8 an action was “superior.” Rather it applied the law to the claims Plaintiff raised:
9 emotional distress damages under the FDCPA.

10 Plaintiff next argues that the Genschorck’s deposition, relied upon by the
11 defendants in support of their motion for summary judgment, was confused by
12 imprecise questioning. ECF No. 66 at 9. However, as Defendant points out,
13 Plaintiff failed to submit a declaration or other proof in opposition to summary
14 judgment. Nor does Plaintiff’s declaration appended to her motion for
15 reconsideration provide “newly discovered” evidence.

16 Plaintiff also maintains that Genschorck is entitled as a matter of law to
17 emotional distress damages for wrongful garnishment. ECF No. 66 at 17.
18 Presumably here Plaintiff is claiming that the Court “committed clear error” in
19 concluding that recovery for mental distress—the only damages sought in this
20 action, as Plaintiff conceded—is not allowed under Washington tort law. ECF No.

1 59 at 15. Plaintiff cites a series of cases in support of her argument that she is
2 entitled to damages for emotional distress upon a showing of violation of a
3 statutory tort. But the Plaintiff's conclusion that statutory torts always provide for
4 emotional distress damages is inaccurate. Rather, "[w]hether emotional distress
5 damages are available following a statutory violation will depend on the language
6 of the particular statute at issue." *White River Estates v. Hiltbruner*, 134 Wash.2d
7 761, 765 (1998). Emotional distress damages may also be a remedy for a statutory
8 violation if the violation sounds in intentional tort. *Id.* at 766. ("In the absence of a
9 clear mandate from the Legislature, Washington courts have 'liberally' construed
10 damages for emotional distress for causes of action, including those based on
11 statutory violations, if the wrong committed is in the nature of an intentional
12 tort.").

13 The Court asks, then, whether a violation of the wrongful garnishment statute
14 sounds in intentional tort. The Washington Supreme Court has found statutory torts
15 to sound in intentional tort—and thus entitle plaintiffs to emotional distress
16 damages—where there was a requirement that a person has "wilfully" trespassed
17 and damaged the property of another, for example. *See Birchler v. Castello Land*
18 *Co.*, 133 Wash.2d 106, 116 (1997) (emotional distress damages available for
19 "willful" violation of timber trespass statute); see also *Cagle v. Burns and Roe,*
20 *Inc.*, 106 Wash.2d 911 (1986) (wrongful termination of employment in violation of

1 public policy is intentional tort and therefore damages for emotional distress were
2 allowed).The court has declined to award emotional distress damages where the
3 statutory violation requires only proof of negligence, as opposed to intentional
4 conduct. *Physicians Ins. Exch. & Assoc. v. Fisons Corp.*, 122 Wash.2d 299, 321
5 (1993). Washington's wrongful garnishment statute provides:

6 In all actions in which a prejudgment writ of garnishment has been issued by a
7 court and served upon a garnishee, in the event judgment is not entered for the
8 plaintiff on the claim sued upon by plaintiff, and the claim has not voluntarily
9 been settled or otherwise satisfied, the defendant shall have an action for
10 damages against the plaintiff. The defendant's action for damages may be
brought by way of a counterclaim in the original action or in a separate action
and, in the action the trier of fact, in addition to other actual damages sustained
by the defendant, may award the defendant reasonable attorney's fees.

11 RCW § 6.26.040. The statute does not require willfulness or intentional behavior
12 to constitute a violation. Thus, the Court can find no indication that it committed
13 clear error in finding that Washington law does not allow for recovery of emotional
14 distress damages arising from wrongful garnishment.

15 Plaintiff also provides additional deposition testimony from another case
16 involving Suttell & Filer. ECF No. 66-1. However, the depositions in question
17 were taken in 2010, and there is no indication that they were only recently
18 discovered by Plaintiff or could not have been discovered with reasonable
19 diligence; accordingly the Court declines to consider them. *See Zimmerman*, 255
20 F.3d at 740. The Court likewise fails to find that the Ms. Genschorck's declaration

1 provides new evidence unavailable at the time the motion for summary judgment
2 was filed. ECF No. 66-3. Nor is the exhibit concerning the superior court's denial
3 of reconsideration of its quashing of the writ of garnishment new evidence, as it
4 was provided with Plaintiff's original complaint in this Court. ECF No. 66-2; ECF
5 No. 1.

6 Finally, Plaintiff reiterates its argument that the Washington Collection
7 Agency Act (WCAA) was violated and provides a remedy. ECF No. 66 at 19. The
8 Court reiterates its finding that the WCAA provides no private right of action on its
9 own, and that its remedy is through the Washington Consumer Protection Act
10 (WCPA). Because Suttell & Hammer's actions giving rise to the alleged liability
11 concern its legal practice, such actions do not constitute trade and commerce as
12 required under the WCPA. Nor does the Court find persuasive Plaintiff's tardy
13 argument that the WCAA provides for "an injunction and declaratory judgment
14 precluding anyone from collecting any amount not principle from Mrs.
15 Genschorck." ECF No. 66 at 21 (citing RCW 19.16.450). Plaintiff failed to make
16 this argument in her complaint, and only mentioned it as an aside in her motion for
17 summary judgment, ECF No. 41 at 2-3 ("the remedy is through the Washington
18 Consumer Protection Act, RCW 19.16.440 with additional remedies in the WCAA
19 including but not limited to...RCW 19.16.460 (injunction)"). Accordingly, the
20 Court will not further consider it here.

1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

2 Plaintiff's Motion for Reconsideration (ECF No. 66) is **DENIED**.

3 The District Court Executive is hereby directed to enter this Order and
4 provide copies to counsel.

5 **DATED** January 16, 2014.



Thomas O. Rice
THOMAS O. RICE
United States District Judge